

EMPLOYMENT LAW ALERT

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Physician Non-Competes - New Flexibility, But Can Hospital Employers Benefit?

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On April 30, 2010, Governor Bredesen signed immediately into law Senate Bill No. 3154 ("SB 3154"), which amends Tenn. Code § 63-1-148 to give employers and contractors of healthcare providers the ability to extend healthcare provider¹ non-compete agreements beyond the previously established six-year limitation if certain requirements are met (as discussed in detail below). Unfortunately, since Tennessee's law continues to contain two other similar but more restrictive statutes, Tenn. Code § 63-6-204 and § 68-11-205, which address physician non-competes between hospitals (including hospital affiliates and faculty practice plans) and certain classes of physicians, it remains unclear whether hospitals can take advantage of the less restrictive provisions of § 63-1-148, including the recently enacted ability to extend non-competes.

In 2007, the Tennessee General Assembly enacted Tenn. Code § 63-1-148, which established a limited ability to enforce reasonable non-competes against healthcare providers. Under § 63-1-148, a non-compete agreement with a healthcare provider is presumed enforceable if the agreement is in writing, the restriction lasts for no longer than two years after the termination of employment (or other contractual relationship), and the restriction is limited in geographic scope to certain prescribed areas (typically either a 10-mile radius from the provider's primary practice site or the county in which the primary practice site is located). These and other general provisions remain unchanged by SB 3154.

As mentioned above, prior to the enactment of SB 3154, the enforcement of a healthcare providers' non-compete was prohibited under Tenn. Code § 63-1-148 if the healthcare provider had been employed by (or had contracted with) the medical practice or facility for more than six years. As amended, this six-year limitation may be avoided and a healthcare provider's non-compete may be extended as long as the parties: (1) mutually agree to renew the non-compete; (2) place the renewal in writing after "subsequent negotiations;" (3) make the renewal for a period not more than an additional six-year term; and (4) support the renewal with additional consideration. This renewal process may be used an unlimited number of times to extend the non-compete for an additional six-year period but must be reinitiated for each six-year extension.

¹ For purposes of Tenn. Code § 63-1-148, healthcare provider refers to individuals licensed as podiatrists, chiropractors, dentists, physicians (excluding emergency medicine specialists and osteopathic physicians), optometrists or psychologists. Tenn. Code § 63-1-148(c)-(d).

Essentially, the parties must "renew" their non-compete "vows" by entering into new non-compete agreements at intervals of six years or fewer. Accordingly, a medical practice or facility must anticipate the healthcare provider's six-year anniversary and present him/her with a new non-compete agreement that will become effective as of the six-year anniversary date. The new non-compete must be the result of "subsequent negotiations" and cannot be accomplished through an automatic renewal or "evergreen" clause contained in a previously signed agreement. Thus, the parties must execute a new agreement or amendment each time.

In addition, the new non-compete agreement must be "supported by consideration." Currently, ongoing employment is generally sufficient consideration for a non-compete agreement in Tennessee. Therefore, the employing entity and healthcare provider could agree to extend the non-compete agreement for an additional six-year period in exchange for ongoing at-will employment. However, if a healthcare provider already has an employment agreement (or contract) which provides for a contractual relationship lasting longer than a period of six years, the healthcare provider will have to be offered some additional "consideration" other than ongoing employment in exchange for renewing his/her non-compete agreement beyond the expiration of the six-year period. Therefore, entities looking to preserve the capability of extending their non-compete agreements with healthcare providers without having to provide additional consideration may wish to consider having the term of any corresponding employment agreements or contracts expire at the same time as the effective limitation on the non-compete covenant. Otherwise, for parties desiring a longer term of agreement that extends beyond the effective limitation on the non-compete covenant, some additional consideration must be offered to the physician for an extension of the non-compete agreement, such as a bonus or some other benefit to which the physician is not already contractually entitled.

Finally, a party's refusal "to extend or enter into a new employment contract shall not be considered grounds for terminating an existing employment contract so long as the employment term of the contract then in effect is a term longer than month-to-month." The legislative history suggests that this final phrase of the amendment was a last minute addition to secure passage. This provision appears intended to preserve a healthcare provider's right to refuse a demand for a new non-compete agreement without that refusal being considered "good cause" for termination of an employment agreement with a term longer than one month. We believe that what is intended by the term "new employment contract" in the amendment is actually a "new non-compete agreement." This provision underscores why a medical practice or facility may want to have the expiration of an employment contract coincide with the six-year anniversary of the healthcare provider's employment, enabling the medical practice or facility to condition continued employment on the healthcare provider's agreement to extend his/her non-compete agreement.

In the end, particular care must be taken when drafting healthcare provider non-compete agreements, particularly for physicians employed by hospitals, since the more restrictive statutes arguably still apply to hospitals.

If you have any questions about this amendment or any of the issues discussed above, please feel free to contact one of our Labor and Employment or Healthcare attorneys listed below.

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